

**Questions and Answers
for Use With the
APEX Nondisclosure Agreement**

August 1980

Attached is a series of questions and answers for use by security officers in government and industry who will be briefing persons required to sign the APEX Nondisclosure Agreement. The introduction may be read to the persons being briefed, but it is not recommended that the questions and answers be routinely disseminated. Instead, they should be retained by the briefing officer and used in responding to questions. Any additional queries may be directed through channels to the APEX Control Staff.

ERRATA SHEET

SUBJECT: Questions and Answers for Use with the APEX Nondisclosure Agreement

REF: Question 3 under Section A General:

"Will the Government pay for the cost of an attorney?"

Add the following to the Answer:

"Active duty members of the military services may consult with the Office of the Judge Advocate General of any of the military services for advice concerning the APEX Nondisclosure Agreement, and advice will be provided without cost, time and operational constraints permitting."

APEX Nondisclosure Agreement

Questions and Answers

Introduction

The President has determined that the US Government will establish a new system to handle Sensitive Compartmented Information (SCI). The new system is called the APEX Special Access Control System.

Before you can gain access to information controlled under the APEX system, you will be required to sign an APEX Nondisclosure Agreement. Every effort has been made to write the Nondisclosure Agreement simply and clearly so that you the reader can readily understand all of the provisions of the Agreement.

In simplest terms the Agreement provides that in return for granting you access to Sensitive Compartmented Information, the Government asks you to agree never to disclose this information to an unauthorized party. The Agreement provides a way for you to be certain whether or not information you wish to disclose or publish is controlled under the APEX System and also specifies certain sanctions or penalties that may be imposed if you violate this Agreement.

We want to make sure that you have read the Agreement carefully and understand it. Therefore, we are prepared to answer any questions you may have about the meaning of any provision of this Agreement. Many of your questions have been addressed before, and we have obtained authoritative answers from the APEX Control Staff and its legal adviser. If we are uncertain about the answers to any question, we will consult with the Control Staff and get the answer for you.

A. General

Why This Form?

1. *Question.* I have (or had) access to Sensitive Compartmented Information (SCI) and signed a different form. Why do I now need to sign this Agreement?

Answer. In the interest of uniformity, every person who will be given access to SCI will have to sign the same Agreement—the APEX Nondisclosure Agreement. The major differences between this and previous agreements is that this one provides a procedure whereby you can determine in advance whether material you intend to publish contains SCI. This helps to avoid the risk of Government legal action against you as a consequence of your publication or disclosure of information. In addition, this Agreement makes explicit your obligations and gives you a better understanding of the actions that may be taken against you if you fail to live up to these obligations.

Do I Need an Attorney?

2. *Question.* Do I need to show this Agreement to an attorney before I sign it?

Answer. It is entirely up to you whether you show the Agreement to a lawyer. We believe the Agreement is simple and straightforward. If we agree to provide you access to SCI information, you agree never to disclose the information to an unauthorized party. If we have failed to answer any questions to your satisfaction or if you simply prefer to show the Agreement to your lawyer and have him clarify any points, however, you may do so.

Let us know before you see an attorney because in certain cases it will be necessary for us to obtain a clearance for your attorney. We also will be pleased to provide your attorney with the name of a Government attorney with whom he may speak if he has any questions.

3. *Question.* Will the Government pay for the cost of an attorney?

Answer. No. In this and similar situations you must pay for your own lawyer. For example, if you go to a bank or finance company for a loan, you must agree to repay the money and also consent to certain actions should you fail to abide by the terms of the loan agreement. You can sign the required forms without going to a lawyer or you can ask your lawyer

for advice, but the bank or finance company is not going to pay for your lawyer. A similar situation applies with respect to the APEX Nondisclosure Agreement.

Failure to Sign

4. *Question.* What will the Government do if I refuse to sign the APEX Nondisclosure Agreement?

Answer. The Government will not provide you with access to Sensitive Compartmented Information or, if you now have such access, will terminate that access. If your current access is terminated, you will still have to abide by the terms of any agreement that you previously signed.

Retention of Agreement

5. *Question.* Can I keep a signed copy of the Nondisclosure Agreement?

Answer. The Agreement itself is not classified. The fact that a particular person signed it at a particular time, however, may be classified. In such a case, you would not be able to keep a signed copy.

If, for example, you were a Government employee and your ostensible duties would not require access to APEX information, the fact that you had signed an APEX Agreement would be classified. If you were a contractor employee and the corporation was working on a project that could not be acknowledged as requiring access to APEX information, the fact that you, a corporate employee, had signed the Agreement would be classified.

Number of Agreements To Be Signed

6. *Question.* Will I have to sign a new APEX Nondisclosure Agreement every time I change employment?

Answer. Ordinarily no. It is intended that you will sign only one APEX Nondisclosure Agreement. Your obligations under this Agreement will apply to any information you receive access to under the APEX System regardless of whether you are in Government or the private sector, regardless of which company or Government agency you work for, and regardless of which Government agency may provide you with access to SCI. Of course, there may be circumstances that will require you to sign another APEX Nondisclosure Agreement. For example, if you change employers and need to begin work on a particular project immediately, you may be asked to sign a new Nondisclosure Agreement if confirmation that you had previously signed an Agreement would be delayed.

**B. Questions About Individual Paragraphs
in the APEX Nondisclosure Agreement**

Paragraph One

1. *Question.* This paragraph mentions the Director of Central Intelligence. Does this mean that if I sign this Agreement I will have access to CIA information?

Answer. Not necessarily. Appropriate information from the Department of State, Department of Energy, Department of Treasury, Department of Justice, and Department of Defense as well as from CIA can be protected under the APEX Control System. The DCI is involved because he is responsible for creating or continuing certain special access programs (Section 4-201 of Executive Order 12065) and for ensuring the establishment of common security and access standards for managing and handling certain systems, information, and products (Section 1-601 (i) of Executive Order 12036).

2. *Question.* This paragraph mentions information that is classified or classifiable. What does classifiable mean?

Answer. This refers to information that meets the criteria for classification under Executive Order 12065, but which has not yet been properly marked. For example, if I give you a briefing on a project that involves classified information, your notes, before they are reviewed and appropriately stamped to indicate their classification, are "classifiable."

Paragraph Two

3. *Question.* This paragraph indicates that I have received a security indoctrination. What happens if after receiving this indoctrination, I decide not to sign the Nondisclosure Agreement.

Answer. The indoctrination does not include classified information and you will be given access to SCI only after you sign the Agreement.

4. *Question.* This paragraph indicates that I "may" be required to sign an acknowledgment when being granted access to each category of Sensitive Compartmented Information. Does this mean I have the choice of signing or refusing to sign such acknowledgments?

Answer. No, you do not have this choice. If a particular Government agency requires that an acknowledgment be signed and you refuse to sign, you will be denied access to the particular category of SCI in question. Government agencies, however, in administering APEX compartments may either require that you sign an acknowledgment or

allow a security officer to record the fact that he briefed you on a particular category of SCI. It is expected that each agency will develop procedures with respect to acknowledgments.

Paragraph Three

5. *Question.* What is meant by "indirect unauthorized disclosure"?

Answer. One example of indirect unauthorized disclosure would be if instead of relating classified details about an APEX project you told an unauthorized individual where he might obtain the information, for instance, that he should read the story on pages 30-33 of a particular magazine because it was entirely accurate.

6. *Question.* The Nondisclosure Agreement mentions the need for prior written authorization. Won't there be cases in which oral approval would be sufficient?

Answer. To avoid any possible misunderstanding at the time of publication or disclosure and the possibility of disputes at some later date, we must insist on written authorization.

Paragraph Four

7. *Question.* Why do I have to submit material for security review to the department or agency that last authorized my SCI access? For example, if my last SCI access was from the Navy but I am writing a book about an Army project, wouldn't it make more sense for me to submit the book to the Army rather than to the Navy? Alternatively, if I have been out of the SCI area for some years and can't remember which department or agency gave me my last access but I do remember working on an SCI project for the Air Force, will I get in trouble if I send my book to the Air Force?

Answer. The requirement that you submit materials for review to the department or agency that last issued you an SCI access was designed to make things as easy for you as possible. If you were working with SCI at the time of submission, we felt it would be easiest for you to submit the book to the department or agency that was sponsoring your SCI access. If you were retired or not working with SCI, we felt you would be more likely to remember the last SCI access you had than the first one.

You need not worry about submitting a book on an Army subject to the Navy because, as indicated in paragraph five of the Agreement, it is the responsibility of the department or agency receiving your

submission to coordinate with other concerned departments or agencies. Indeed, this requirement works in your favor because you are not required to guess which department or agency should review the submitted material and, if your book covers a number of subjects, you do not have to be concerned about submitting copies to more than one agency.

It also should be clear that as long as material is received by any department or agency under the APEX Control System, the review process can be accomplished and we will not object or penalize you if you send your material to any department or agency from whom you received SCI access.

8. *Question.* I still am not sure what materials I need to submit for review.

Answer. Any proposed disclosure or publication whether written or oral that may relate to, be based upon, or contain SCI should be submitted for review. For your own protection we recommend that you submit for review all material relating to intelligence or intelligence activities. In that way we can inform you whether SCI could be jeopardized and assist you to avoid causing inadvertent harm to the national security. You will also avoid any risk that Government legal action would have to be taken against you.

9. *Question.* As a contractor employee I regularly draft proposals. Can SCI be used in such proposals and disseminated without the need to obtain prior written authorization?

Answer. Only if the recipients of the proposal are cleared for that category of SCI.

10. *Question.* Certain information that I know to be SCI has appeared in a newspaper article. Can I consider this information declassified and freely quote the article and disseminate the SCI information without obtaining prior written authorization?

Answer. An unauthorized disclosure of classified information does not result in declassification of the information. Of course, in the abstract, merely quoting a newspaper article is not a problem. If you quote the article in a context that confirms its accuracy, however, you will have breached this Nondisclosure Agreement.

Paragraph Five

11. *Question.* What can I expect to happen in the course of the security review of the materials I have submitted?

Answer. The department or agency that receives the submitted material will make certain that all of the other departments and agencies that have given you SCI access have an opportunity to review the material. If the information you wish to disclose does not involve SCI or classified information, you will be so advised in writing by the department or agency that received the material. If the reverse is true, either the department or agency to which you sent the material or the department or agency whose material is most heavily involved will inform you of this fact and, following this notification, discuss with you recommended deletions or revisions that would avoid exposure of SCI.

We would hope that in a majority of cases a way could be found to accommodate your publication requirements, maintain the sense of what you wish to convey, and at the same time avoid possible damage to the national security. Considerable experience with prepublication review supports such optimism.

12. *Question.* Will the review process be used to prevent me from writing articles that may be critical of, or embarrassing to, the Government?

Answer. No. You are free to criticize or embarrass the Government as much as you desire. The only information that the Government can oblige you to delete is information that is classified.

13. *Question.* Can the review process be used as a device to prevent me from bringing illegal, improper, or wasteful activities to the attention of the proper authorities?

Answer. No. Whether or not classified information is involved you are free to bring evidence of such activities to the attention of the head of the department or agency, or to the Inspector General or General Counsel; to the Attorney General of the United States; to the Intelligence Oversight Board, or to the House or Senate Intelligence Committees.

14. *Question.* Am I free to publish if I do not receive a response within 30 working days?

Answer. No, you should not consider yourself free to publish until you have received the written authorization mentioned in paragraph four of this Agreement. Should the Government fail to respond within 30 working days, however, you should notify the head of the agency to which you submitted the material or the DCI. Every effort will be made to expedite your case.

15. *Question.* What recourse do I have if I disagree with the Government's position on classification?

Answer. You can appeal to the appropriate Senior Intelligence Officer (SIO) and, if still dissatisfied, you can sue for a judicial determination on the issue of classification.

16. *Question.* Can the Government keep me from publishing or disclosing information?

Answer. In an appropriate case, the Government can go into court and seek a Temporary Restraining Order. This Order, backed by the power of the court, would forbid you from publishing or disclosing the information until the court could hold a hearing on the matter and determine what relief is appropriate. The court could rule in your favor and sanction publication or it could issue a permanent injunction forbidding publication.

Paragraph Six

17. *Question.* This paragraph indicates that a breach of this Agreement may result in the termination of my employment. If I am in military service and breach this Agreement, will I receive an automatic discharge?

Answer. Breach of the Nondisclosure Agreement does not result in an automatic discharge from military service. The specific administrative sanctions, which your service will take against you, will be determined by that service.

18. *Question.* I am a contractor employee. Can I be fired for breaching my Nondisclosure Agreement?

Answer. The US Government cannot fire a person who is not a US Government employee nor can it order your employer to fire you. Indeed, the Government will not make any employment or discharge

recommendations to the company. It can, however, revoke your access to SCI and your security clearances. It also can forbid the company from using your services on SCI and classified projects.

19. *Question.* What is the meaning of the sentence "Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation"?

Answer. It means that you may be prosecuted for any law you may have violated, not just the laws specifically mentioned in this Agreement.

Paragraph Seven

20. *Question.* This paragraph informs me that the Government may "seek any remedy available to it" to enforce the Agreement. What does this mean?

Answer. The Government may seek a court injunction to prevent an unauthorized disclosure of SCI. It also may take a variety of administrative or legal steps either to prevent the violation of this Agreement or to punish you if you have breached the Agreement. These steps may include:

- a. Imposition of penalties prescribed for security violations.
- b. Revocation of SCI access and security clearances.
- c. Imposition of appropriate administrative sanctions up to and including termination of Government employment.
- d. Assessment of any financial penalties that may be provided by contract between the Government and the contractor.
- e. Seeking injunctive relief from a court that would forbid disclosure of SCI information.
- f. Institution of a civil suit for recovery of damages suffered by the Government as a result of your breach of this Agreement and recovery of any financial gain you may have realized as a result of the breach.
- g. Initiation of criminal prosecution against you.

21. *Question.* Why should I pay the Government's court costs if the Government doesn't want me to publish certain information?

Answer. The Government at its own expense will review any material you desire to disseminate or publish to determine whether it contains information that requires protection under the APEX Control System. The Government also is willing to work with you in an attempt to find an alternative wording that will convey the substance of what you wish to communicate but without exposing such information. If, however, the Government must go to court to enforce this Agreement, it will ask the court to require that you pay court costs and attorney fees that it incurs as a result.

Paragraph Eight

22. *Question.* Will the Nondisclosure Agreement prevent me from seeking a patent for a device that is based on SCI?

Answer. If you would be entitled to a patent, but your invention is based upon SCI, you are required to submit the invention for a classification determination to the department or agency that granted the SCI access. If the invention is classified, appropriate procedures would have to be followed. Ultimate declassification of the invention would have to include a determination that Sensitive Compartmented Information would not be jeopardized thereby. Upon declassification, however, your patent rights would not be affected by this Nondisclosure Agreement.

Paragraph Nine

23. *Question.* This paragraph uses the term "authorized representative" of the department or agency. Who is an "authorized representative"?

Answer. By authorized representative it is meant the SIO or his designee. Ordinarily responses to questions relating to this Agreement will come from the APEX Control Officer or a member of the Office of General Counsel of the department or agency to which you submitted your material. Such persons should be considered authorized representatives.

24. *Question.* Does this paragraph mean that my obligations under the Agreement apply even if I do not currently have SCI access and even if I am no longer employed by the Government or working on any Government contracts?

Answer. Yes. You are obligated to protect Sensitive Compartmented Information from unauthorized disclosure in perpetuity from the time you receive access to this information. Clearly, the injury to the United States that may result from unauthorized disclosure of SCI does not depend on your employment status but rather on the exposure of information that may enable foreign nations to take steps to deny us information or neutralize our intelligence efforts. To prevent such injury, you are required to submit for review any material you wish to publish or disclose that contains or may be based upon SCI, even though you may no longer have SCI access.

Paragraph Ten

25. *Question.* This paragraph notes that if a court should find any provision of this Agreement to be unenforceable, all other provisions remain in full force and effect. Which provisions are of doubtful legality and thus unenforceable?

Answer. We do not believe, and do not mean to imply, that there are any provisions of doubtful legality. Nor do we expect a court to find any portion of the Nondisclosure Agreement to be unenforceable. This Agreement is designed to be used for many years and, realizing that certain legal changes will occur from decade to decade, we have included standard language used in drafting legislation as well as contractual agreements as a precaution in case of unforeseen changes in the law.

26. *Question.* This paragraph indicates that the Nondisclosure Agreement only relates to SCI. Paragraph 3, however, states that "I further understand that I am obligated by law and regulation not to disclose any classified information." How do these paragraphs relate to each other?

Answer. The statement in paragraph 3 was included to remind you of your obligation to protect other classified information and to prevent the erroneous conclusion that by signing the APEX Nondisclosure Agreement and obtaining SCI access you are relieved of a duty to protect such classified information.

Paragraph Twelve

27. *Question.* Does this paragraph mean that if I sign the Nondisclosure Agreement and then write a book I will not be entitled to retain any royalties I may earn?

Answer. The assignment clause refers to royalties that result from disclosures, publications, or revelations not consistent with the terms of this Agreement. If, for example, the subject matter of your book is such that you should have had reason to believe that it was based on SCI and you did not give the Government an opportunity to review the book, then the assignment clause would apply. If you submitted the book for review and were informed that it did not contain SCI or if you deleted any SCI so identified, no royalties would be at risk. Similarly, if the subject matter of the book was such that you would have no reason to believe that it contained SCI information (for example, a book on early American furniture), there would be no reason to submit it for review and no reason to expect that your royalties would be in jeopardy.